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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1941

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No. [REDACTED] 107

MARY BOYD EVANS,

vs.

*Petitioner,*

COMMISSIONER OF INTERNAL REVENUE

No. [REDACTED] 108

KATHARINE BOYD MOREHEAD,

vs.

*Petitioner,*

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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FOR THE THIRD CIRCUIT.**

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The undersigned counsel, on behalf of Mary Boyd Evans and Katharine Boyd Morehead, prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Third Circuit entered March 2, 1942.

### **Opinions Below.**

The opinions of the Board of Tax Appeals (R. 7-16) are reported in 42 B. T. A. 851. The opinion of the Circuit Court of Appeals (R. 54-59) is reported in 126 F. (2d) 270.

### **Jurisdiction.**

The jurisdiction of this Court is invoked under section 347 of the United States Code (Judicial Code, § 240 as amended) and section 1141 of the Internal Revenue Code. The decree of the Circuit Court of Appeals was entered March 2, 1942.

### **Question Presented.**

Whether the income of certain trusts is taxable to the trustee or to the petitioners.

### **Statutes Involved.**

Sections 166 and 167 of the Revenue Acts of 1934 and 1936 were relied upon by the Circuit Court of Appeals as the basis of its decision. The pertinent parts of those sections provide:

#### **"SEC. 166. REVOCABLE TRUSTS.**

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

“SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

“(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) \* \* \*

then such part of the income of the trust shall be included in computing the net income of the grantor.

“(b) As used in this section the term ‘in the discretion of the grantor’ means ‘in the discretion of the grantor either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.’ ”

Sections 161 and 162 of the Revenue Acts of 1934 and 1936, relied on by petitioners, provide:

“SEC. 161. IMPOSITION OF TAX.

“(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, \* \* \*

(3) \* \* \*

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for the benefit of the grantor). For return made by beneficiary, see section 142.”

“SEC. 162. NET INCOME.

“The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that

(a) \* \* \*

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries \* \* \* but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. \* \* \*

(c) \* \* \* in the case of income which, in the discretion of the fiduciary may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the \* \* \* trust the amount of the income of the \* \* \* trust for its taxable year, which is properly paid or credited during such year to any \* \* \* beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the \* \* \* beneficiary.”



### Statement.

The petitioners, who are sisters, executed identical trust instruments under the same conditions. For simplicity a single case will be described.<sup>1</sup>

Mrs. Boyd, under her husband's will, had a life interest (with power of sale) in his property which consisted almost entirely of 500 shares of stock of the Journal Company. After her death the remainder would go to her daughters (the petitioners).

Over a period of about three years prior to 1931, Mrs. Boyd considered the advisability of placing in trust, during her lifetime, a portion of the 500 shares of Journal Company stock for the protection and benefit of each of her two daughters and their children. Originally Mrs. Boyd planned to create a trust of her life interest and have petitioner make a supplementary trust of her remainder (R. 44).

In the fall of 1931, after several conferences with members of the family and her attorneys, Mrs. Boyd proposed to transfer her life interest in 166 shares of Journal Company stock to petitioner, with the understanding that petitioner would immediately thereafter execute a trust instrument which Mrs. Boyd had caused to be drawn for her to sign as grantor, and petitioner agreed to such proposal.<sup>2</sup>

The proposal was carried out and petitioner executed the trust instrument, prepared in accordance with Mrs. Boyd's ideas which were, *inter alia*: (1) to provide a sufficient income for the maintenance of petitioner for life and

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<sup>1</sup> The findings of fact made by the Board appear at pp. 8-13 of the record. The testimony of petitioners' witnesses was undisputed.

<sup>2</sup> R. 9.

thereafter for her children, and (2) to provide for the accumulation out of income of a fund to build up the corpus so as to guard against possible subsequent worthlessness of the Journal stock.<sup>3</sup>

The trust is irrevocable and contains a typical "spend-thrift" clause<sup>4</sup> prohibiting anticipation or assignment by any beneficiary. It provides for the accumulation of part of the income and the payment of the balance to petitioner (subject to the right in petitioner to split off shares of her interest for the benefit of her children).<sup>5</sup> After petitioner's death the income and eventually the corpus goes to petitioner's issue.<sup>6</sup>

The trust instrument contains the following provision, which was the basis of respondent's contentions:

"10. If, during the continuance of this trust, the income currently payable hereunder to or for the benefit of any beneficiary, together with his or her income from other sources, should be insufficient to properly provide for the support, maintenance, benefit and/or education of such beneficiary and his or her dependents, Trustee is authorized and empowered, in its sole discretion, to pay over unto or for the benefit of such beneficiary so much of the principal of any part or the whole of the trust fund from which such beneficiary may then be receiving the income or the benefit thereof, as may from time to time be required to make up such insufficiency of income. The receipt of any beneficiary for or evidence of the application to the benefit of any beneficiary or any payment made in conformity with the foregoing provision shall fully discharge Trustee from any further liability in connection therewith."<sup>7</sup>

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<sup>3</sup> R. 10.

<sup>4</sup> ¶ 9, R. 11.

<sup>5</sup> R. 11.

<sup>6</sup> R. 11.

<sup>7</sup> R. 11-12.

The trustee never made any distribution to petitioner under this provision.<sup>8</sup> And the Board of Tax Appeals found as a fact that—

“During the taxable years each of the petitioners was the owner of separate property and had income other than that received from the trusts. At no time from the creation of the trusts to the end of the year 1936 has the income of either of the petitioners, by distributions of income from the trusts and from other sources, been insufficient to properly provide for her support, maintenance, benefit, and/or education, or for that of her dependents.”<sup>9</sup>

In the taxable years in litigation the trustee accumulated certain income under the provision for accumulation, and distributed the balance to petitioner. The part distributed to petitioner was reported by her as part of her income. The accumulated part was reported by the trustee as income taxable to the trust. The respondent added the accumulated income to petitioner's taxable income and determined a deficiency in tax<sup>10</sup> on the theory that under Section 10 of the trust agreement the petitioner was able at any time to have the income, which was being accumulated, paid to her, or to recapture the corpus, and that, accordingly, the accumulated income was taxable to petitioner under Section 166 or Section 167 of the Revenue Acts.

The Board of Tax Appeals decided otherwise, holding that Section 10 of the trust instrument was only operative in a contingency not within petitioner's control, and that such contingency had not occurred, and accordingly that Sections 166 and 167 of the statutes were inapplicable. The Board found the facts with respect to Mrs. Boyd's con-

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<sup>8</sup> R. 12.

<sup>9</sup> R. 12.

<sup>10</sup> R. 13.

tribution of her life estate to the corpus of the trust on condition that petitioner execute the prepared instrument, but did not pass on petitioner's contention that Mrs. Boyd and not petitioner was the real grantor.

The Circuit Court of Appeals reversed the Board, holding (1) that petitioner was at all times in a position to take all of the income or to recapture all of the corpus of the trust, and (2) that petitioner was the real grantor within the meaning of the statute although Mrs. Boyd had transferred her life estate to petitioner on the express condition that petitioner execute the prepared trust instrument.

### **Specification of Errors.**

The Circuit Court of Appeals erred in each case :

(1) In holding that the petitioner was the real grantor of the trust, with respect to income derived from Mrs. Boyd's life interest.

(2) In upsetting a finding of fact made by the Board of Tax Appeals.

(3) In holding that the income accumulated by the trustee was taxable to the petitioner.

(4.) In reversing the decision of the Board of Tax Appeals.

### **Reasons for Granting the Writs.**

(1) There is a direct conflict between the decision of the Circuit Court of Appeals in these cases and that of the Circuit Court of Appeals for the Sixth Circuit in *Buhl v. Kavanaugh*, 118 F. (2d) 315 (1941). The decision herein is also in conflict with the reasoning of this Court in *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, and that of the Circuit Court of Appeals for the Second Circuit in *Lehman v. Commissioner*, 109 F. (2d) 99 (cert. den. 310 U. S. 637),

and of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner v. Warner* (May 2, 1942).

(2) The decision of the Circuit Court of Appeals is probably in conflict with the decision of the Supreme Court in *Wilmington Trust Co., Executor of Alice du Pont Ortiz, v. Helvering*, — U. S. — (April 27, 1942), and other decisions of the Supreme Court therein cited.

Wherefore, it is respectfully submitted that the petition should be granted.

JAMES S. Y. IVINS,  
*Attorney for Petitioners.*

June, 1942.